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NO. 90-5551

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

EDWARD HAROLD SCHAD, Petitioner

- versus -

STATE OF ARIZONA, Respondent

On Writ Of Certiorari To The
Supreme Court Of Arizona

# BRIEF OF AMICI CURIAE FOR RESPONDENT ARIZONA BY KENTUCKY AND CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, INDIANA, MARYLAND, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND VIRGINIA

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## QUESTIONS PRESENTED FOR REVIEW

1. Does a jury instruction combining alternative theories of guilt, both of which are supported by evidence, deprive the defendant of a unanimous verdict?

2. Do the Eighth Amendment and the Fourteenth Amendment's Due Process Clause permit state law to determine when a lesser-included offense instruction should be given?

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## INTERESTS OF AMICI CURIAE IN SUPPORT OF RESPONDENT ARIZONA

The amici curiae represented here are States interested in whether or not the Sixth, Eighth and Fourteenth Amendments require a unanimous verdict on the manner in which the offense of first-degree murder was committed, and the circumstances under which jury instructions on lesser degrees of the charged offense must be given.

Amici submit this brief in support of Respondent, the State of Arizona, through their Attorneys General or Chief State Attorneys pursuant to United States Supreme Court Rule 37.3.

## SUMMARY OF ARGUMENT

I.

The courts below correctly held that the Sixth and Fourteenth Amendments do not require a unanimous jury verdict on the manner in which a defendant committed first-degree murder. To rule otherwise would substantially depart from the premise of this Court that jury unanimity is not a constitutional right. It would also

interfere with the prerogative of State legislatures whose function is to determine public policy concerning crimes and punishments.

A plurality of state and federal courts have held that juries need not unanimously agree on the manner in which the crime was committed when the statute permits conviction under either one of two theories so long as the evidence supports the existence of either.

II.

The United States Constitution permits each State to define the elements of a criminal offense. Whether one offense constitutes a lesser-included offense of a second offense which imposes a greater punishment must be determined as a matter of State law. The fact that two offenses are the "same offense" for purposes of collateral estoppel (prosecution preclusion) under the Double Jeopardy Clause does not necessarily establish that one offense is a lesser-included offense of the other. Since it is possible to commit felony murder without committing a robbery and possible to

commit robbery without committing felony murder, robbery is not a lesser-included offense of felony murder under the statutory elements test. Even when one offense (robbery) is a lesser-included offense of another offense (felony murder), neither the Eighth Amendment nor the Due Process Clause requires that the jury be instructed on the lesser offense unless there is evidence which would rationally permit a jury to find a defendant guilty of the lesser offense and acquit him of the greater offense. The States may constitutionally impose upon the defendant the burden of producing evidence to support a lesser-included offense instruction by creating a factual dispute on the element or elements differentiating the lesser offense from the greater offense.

## ARGUMENT

I. AN INSTRUCTION COMBINING TWO ALTERNATIVE THEORIES OF GUILT, BOTH OF WHICH ARE SUPPORTED BY EVIDENCE, DOES NOT DEPRIVE THE DEFENDANT OF A UNANIMOUS JURY VERDICT.

A. THE UNITED STATES CONSTITUTION DOES NOT REQUIRE UNANIMITY OF VERDICT IN STATE COURT CRIMINAL PROCEEDINGS.

Petitioner argues that the Sixth Amendment

and the Due Process Clause of the Fourteenth Amendment require a unanimous verdict in state court criminal proceedings as to the manner in which a crime was committed. Petitioner alleges that unanimous agreement on the manner in which the crime was committed is required to give effect to the reasonable doubt standard. The requirement of unanimity, however, can be found nowhere within the Constitution. The Court has held that a state court conviction by less than a unanimous jury does not violate the Sixth Amendment right to a trial by jury. Apodaca v. Oregon, 406 U.S. 404 (1972). The Court reached this holding after reviewing the constitutional history of the Sixth Amendment discussed in Williams v. Florida, 399 U.S. 78 (1970). The legislative history indicates the language of the Sixth Amendment was altered from the original form introduced by James Madison. The wording of the amendment that emerged from the House Committee no longer contained the phrase, "unanimity for conviction." The Court opined that, "The deletion was intended to have some

substantive effect." Apodaca, 406 U.S. at 410. See Williams, 399 U.S. at 96-97. Therefore, the Court focused on the function the jury serves in contemporary society and noted:

> (T)he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen.

Apodaca, 406 U.S. at 410, quoting Williams, 399 U.S. at 100. The unanimity requirement, however, "does not materially contribute to the exercise of this commonsense judgment." Apodaca, 406 U.S. at 410. Thus, "The Sixth Amendment does not require proof beyond a reasonable doubt at all." Apodaca, 406 U.S. at 412. The Court has expressly stated that due process of law does not require jury unanimity. Johnson v. Louisiana, 406 U.S. 356, 360 (1972). Jury unanimity is a right flowing from federal statute,[1] not the Constitution. United States v. Gipson, 553 F.2d 453, 457 (5th Cir. (1977),

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[1]Rule 31(a) of the Federal Rules of Criminal Procedure requires a unanimous jury verdict in a federal criminal trial.

cited by Petitioner, acknowledges that there is no unanimous verdict requirement in state criminal proceedings.

> In criminal cases due process of law is not denied by a state law which dispenses with a grand jury indictment and permits prosecution upon information, nor by law which dispenses with the necessity of a jury of twelve, or unanimity in the verdict.

Jordan v. Massachusetts, 255 U.S. 167, 176 (1912) (dictim) (emphasis added). See Johnson, 406 U.S. at 359. The decision as to unanimity of verdict is properly left to the state legislatures.

> We are not invested with the jurisdiction to pass upon the expediency, wisdom, or justice of the laws of the states as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. Under the gauge of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just, and fitting rules of government to be adopted by a free people, and confound them with constitutional limitations.

Twining v. New Jersey, 211 U.S. 78 (1908). This view was reaffirmed in Patterson v. New York, 432 U.S. 197, 201 (1977):

> Preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. [Citation omitted].

The concurrence in Johnson echoes the Court's opinions in Twining and Patterson:

> . . . I do not imply that I regard a State's split-verdict system as a wise one. My vote means only that I cannot conclude that the system is constitutionally offensive. Were I a legislator, I would disfavor it as a matter of policy. Our task here, however, is not to pursue and strike down what happens to impress us as undesirable legislative policy.

Johnson, 406 U.S. at 365, (Blackmun, J., concurring). The Arizona system which permits a jury to convict of first-degree murder by finding premeditation or felony murder does not violate any federal constitutional right.

### B. A NUMBER OF JURISDICTIONS HOLD THAT A DEFENDANT IS NOT ENTITLED TO A UNANIMOUS VERDICT ON THE PRECISE MANNER OR THEORY IN WHICH THE OFFENSE WAS COMMITTED.

The Arizona Legislature has chosen to classify murder into first and second degrees. First-degree murder is committed by

premeditation or in the course of a felony. Ariz.Rev.Stat. §13-1105 (Appendix). It is only one crime, however, and this protects a defendant against double jeopardy. State v. Encinas, 647 P.2d 624, 627 (Ariz. 1982).

> Because murder is a single offense, the State is ordinarily required to proceed upon all available theories in a single prosecution, and it may not bring seriatim prosecutions for the same offense by alleging separate legal theories.

State v. Arnett, 760 P.2d 1064, 1069 (Ariz. 1988) quoting Ross v. State, 519 A.2d 735, 739 (Md. 1987). The defendant is entitled only to a unanimous verdict on whether first-degree murder was in fact committed, not to a unanimous verdict on the precise manner in which the crime was committed. Arnett, 760 P.2d at 1069. See State v. Smith, 665 P.2d 995, 999 (Ariz. 1983); State v. Berndt, 672 P.2d 1311 (Ariz. 1983). See generally United States v. Bouquett, 820 F.2d 165 (6th Cir. 1987) (drug prosecution); United States v. McPherson, 782 F.2d 66 (6th Cir. 1986) (embezzlement) (per curiam); United States v. Acosta, 748 F.2d 577 (11th Cir. 1984)

(embezzlement or misapplication). Arnett concluded that the jury could have found the defendant guilty of first-degree murder based on any of three theories.

> Because the verdict need not specify under which theory the defendant was convicted, and because we find ample evidence to support each theory, we affirm the defendant's conviction of first-degree murder.

Arnett, 760 P.2d at 1069. Arnett v. Ricketts, 665 F.Supp. 1437, 1441 (D.Ariz. 1987), upheld State v. Arnett, 760 P.2d 1064 (Ariz. 1988). The defendant asserted Sixth and Fourteenth Amendment challenges claiming the jurors may not have unanimously agreed on the manner in which he committed first-degree murder. The federal district court rejected these constitutional claims holding that a person is "not entitled to a unanimous verdict on the precise manner in which the act was committed." Arnett, 665 F.Supp. at 1441.

Support for Arizona's approach[2] is

[2]See Annotation, "Requirement of Jury Unanimity as to Mode of Committing Crime Under Statute Setting Forth the Various Modes by Which Offense may be Committed," 75 ALR 4th 92 (1990).

found as early as 1903 in the case of People v. Sullivan, 65 N.E. 989 (1903). Sullivan has been quoted at length in Holland v. State, 280 N.W.2d 288, 292 (Wis. 1979), cert. denied, 445 U.S. 931 (1980) and in People v. Travis, 525 N.E.2d 1137, 1147 (Ill.App. 4 Dist. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1149 (1989).

The New York Court of Appeals in Sullivan reviewed the defendant's claim that his right to a unanimous verdict was violated because the jury was permitted to convict him by concluding he committed premeditated or felony murder. The court affirmed the conviction stating:

> There was but a single crime charged in the indictment against the defendant -- that of murder in the first-degree; and the only issue to be determined by the jury was whether the defendant had been guilty of that crime. Under our statute . . . so far as applicable to the case before us, proof either that the defendant killed the deceased with a deliberate and premeditated design to affect his death, or while the defendant was engaged in the commission of a felony, or an attempt to commit a felony, though without any design to take life, established his guilt of the crime charged. 'It is not necessary that a jury, in order to find a verdict, should concur in a single view of the transaction disclosed by the evidence. If the conclusion may be

> justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon the other.' Murray v. Insurance Co., 96 N.Y. 614, 48 Am.Rep. 658. So, in this case, it was not necessary that all the jurors should agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of a felony, or in an attempt to commit one. It was sufficient that each juror was convinced beyond a reasonable doubt that the defendant had committed the crime of murder in the first-degree as that offense is defined by the statute.

Sullivan, 65 N.E. at 989-990. See People v. Adcox, 763 P.2d 906 (Cal. 1988).

Holland, supra, reviewed a second-degree murder conviction where the defendant claimed the jury should have agreed unanimously as to the manner of participation in the crime. Holland distinguished the holding in United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) by noting that the six acts prohibited in the Gipson statute fell into two different conceptual groupings. Within each grouping the acts were similar enough to allow a finding of the actus reus element of the offense despite

differences among jurors as to which of the intragroup acts the defendant committed. "[T]he two groups, however, were conceptually distinct such that a jury finding the actus reus element of the offense would not be unanimous." Gipson, 553 F.2d at 548. The court held, however, that unanimity was required only on the ultimate issue on the guilt of the crime charged. Unanimity was not required on the three alternative theories (direct commission, aiding and abetting and conspiracy) upon which the second-degree murder could have been accomplished. Holland, 280 N.W.2d at 292. In essence, these three theories were in the same conceptual grouping and therefore did not violate the state constitutional right to unanimous verdict. See, e.g., Travis, supra, (quoting Sullivan and Holland in holding that jury verdict need not be unanimous on alternate ways in which crime can be committed); State v. Williams, 285 N.W.2d 248, 270 (Iowa 1979), cert. denied, 486 U.S. 921 (1980) (holding the actus reus is identical for either premeditated murder

or felony murder). See also United States v. McPherson, 782 F.2d 66 (6th Cir. 1986) (per curiam); State v. James, 698 P.2d 1161 (Alaska 1985).

> Juries are typically called upon to render unanimous verdicts on the ultimate issues of a given case. But it is understood that different jurors may be persuaded by different pieces of evidence, even when they agree on the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.

McKoy v. North Carolina, ___ U.S. ___, 110 S.Ct. 1227 (1990) (Blackmun, J., concurring).

1. Jurisdictions Rejecting Instructions Requiring Jury Unanimity On Manner In Which First-Degree Murder Occurred.

The Oklahoma Court of Criminal Appeals specifically addressed claims of due process violations regarding jury unanimity in James v. State, 637 P.2d 862 (Okla.Cr. 1981). The defendant claimed his due process rights were violated because the jury was not instructed to unanimously find either that he committed murder with malice aforethought or while committing robbery with a dangerous weapon. The court acknowledged that due process required each

element of a crime to be proven but concluded that this had been accomplished.

> The State established a prima facie case of murder in the first-degree by proving first, that the homicide occurred during an armed robbery, and therefore, fell within felony murder; and second, that the appellant had committed the homicide with premeditation. No violation of due process occurred.

James, 637 P.2d at 865. To the same effect is the holding in Newsted v. State, 720 P.2d 734 (Okla.Cr. 1986), cert. denied, 479 U.S. 995 (1986). Newsted claimed his due process rights were violated because the court had not instructed the jury to unanimously find guilt on the two theories comprising first-degree murder: malice aforethought or while committing robbery with a dangerous weapon. The court ruled no violation of due process occurred and based its decision on the holding in James, supra. Newsted, 720 P.2d at 737. See also People v. Guerra, 708 P.2d 1252 (Cal. 1985).

The Washington Court of Appeals examined this issue in State v. Ellison, 676 P.2d 531 (Wash.App. 1984). The court stated that the

determining factor was whether the criminal statute describes a single offense which can be committed in more than one way rather than separate and distinct offenses. To determine if the statute describes multiple offenses or a single offense committable in different ways the court used the following criteria:

> [1] the title of the act; [2] whether there is a readily perceivable connection between the various acts set forth; [3] whether the acts are consistent with and not repugnant to each other; [4] and whether the acts may inhere in the same transaction.

Ellison, 676 P.2d at 537. Comparing these factors to first-degree murder and felony murder, the court concluded they met the above criteria. Thus, an instruction was not required on unanimity as to the means by which the defendant committed murder where both theories were supported by sufficient evidence. Ellison, 676 P.2d at 538. See also Brown v. State, 473 So.2d 1260 (Fla. 1985), cert. denied, 474 U.S. 1038 (1985) (Rejecting request for special verdict forms which would have indicated whether first-degree murder conviction was based upon

premeditation or felony murder).

2. Jurisdictions Upholding Instructions Informing Jury That Verdict Need Only Be Unanimous As To First-Degree Murder And Not As To The Manner In Which The First-Degree Murder Occurred.

In People v. Milan, 507 P.2d 956, 961 (Cal. 1973) the California Supreme Court reviewed a claimed error in the following jury instruction:

> It is not necessary that all jurors agree in the determination that there was a deliberate and premeditated design to take the life of the deceased, or in the conclusion that the defendant was at the time engaged in the commission of robbery, or in an attempt to commit one; it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant committed the crime of murder in the first-degree as that offense is defined.

The court upheld the giving of this instruction citing previous caselaw and the general premise that it was not necessary that all jurors unanimously agree on the theory in which the first-degree murder occurred. Milan, 507 P.2d at 962. See also People v. Nye, 403 P.2d 736 (Cal. 1965), cert. denied, 384 U.S. 1026-1027 (1966); People v. Chavez, 234 P.2d 632 (Cal. 1951).

Similarly, in State v. Hazelett, 492 P.2d 501 (Or.App. 1972) the defendant claimed the court erred in instructing the jury it need not unanimously agree on whether the killing was premeditated or felony murder as long as they unanimously agreed on guilt for first-degree murder. While acknowledging that in some cases this type of instruction would be error if the state's case included evidence of numerous acts, the Oregon Court of Appeals concluded:

> Here, there was only one act charged and proved -- the act of taking the life of the victim. Whether this was done with premeditation or while attempting rape related to the defendant's mental state, and did not relate in any way to the act charged. Since the legal effect of committing the act is the same whether done with premeditation or while attempting rape, there is no reason to require the jury to unanimously agree on which of the two possible mental states, both equally culpable, defendant possessed at the time of the murder charged.

Hazelett, 492 P.2d at 503.

3. Jurisdictions Rejecting Defendant's Motion That At Close Of Evidence The State Elect Which Theory Of First-Degree Murder Would Be Submitted To The Jury.

State v. Silhan, 275 S.E.2d 450 (N.C. 1981)

reviewed a claim of error that at the close of evidence the prosecutor was required to elect which theory of first-degree murder (felony murder or murder with premeditation and deliberation) would be submitted to the jury. The North Carolina Supreme Court rejected this argument stating the evidence was sufficient to establish a prima facie case on either theory. "[I]t became the responsibility of the jury to weigh the evidence to see if it warranted a finding that defendant was guilty of murder in the first-degree upon either or both theories." Silhan, 275 S.E.2d at 462. To the same effect see State v. Lamb, 497 P.2d 275, 290 (Kan. 1972) overruled on other grounds State v. Jacques, 587 P.2d 861 (Kan. 1978) (upholding information charging premeditated and felony murder as sufficiently apprising defendant that state would proceed on both theories); State v. Jefferson, 529 S.W.2d 674, 678 (Tenn. 1975) (upholding indictment charging first-degree murder based on different "means and intents"); see also United States v. White, 879 F.2d 1509

(7th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1471 (1990) (every theory of bankruptcy fraud need not be placed in separate count of indictment).

II. PETITIONER WAS NOT CONSTITUTIONALLY ENTITLED TO A ROBBERY INSTRUCTION AS A LESSER-INCLUDED OFFENSE OF MURDER.

A. STATE LAW MUST CONTROL THE DETERMINATION AS TO WHETHER OR NOT A LESSER-INCLUDED OFFENSE OF FELONY MURDER EXISTS.

In this case, the Arizona Supreme Court explained its ruling that robbery is not a lesser-included offense of felony murder:

> However, in Arizona there is no lesser-included offense to felony murder. Although we agree with the defendant that the evidence supported an instruction and conviction for robbery, we disagree that the underlying felony supporting a felony murder conviction requires a lesser-included offense instruction and form of verdict. [Citations omitted.]

State v. Schad, 788 P.2d 1162 at 1168 (Ariz. 1989).

Felony murder is defined as first-degree murder under Ariz.Rev.Stat. §13-1105 (Appendix).

State v. LeGrand, 734 P.2d 563 at 572 (Ariz. 1987), explained why no lesser-included offense to felony murder existed:

> It is well established that no lesser included offense to felony murder exists because the mens rea necessary to satisfy the premeditation element of first-degree murder is supplied by the specific intent required for the felony. Where no lesser included offense exists, it is not error to refuse the instruction. [Citations omitted.]

Under Arizona law, felony murder is a strict liability offense, as noted in State v. Ferrari, 541 P.2d 921 at 925 (Ariz. 1975) (opinion by Justice O'Connor).

State v. Hitchcock, 350 P.2d 681 at 687 (Ariz. 1960), explained the strict liability rationale for felony murder and upheld the jury instructions given by the trial court. The jury instructions stated in part:

> The defendant is charged in count one of the information with the crime of murder in the first-degree[.] . . . If you determine that the defendant was not engaged in the commission of a robbery at the time Ernest DeVito was killed, then you have no alternative but to acquit the defendant on count one of the information.

Thus, Arizona law has long provided that if the jury concludes that a defendant is not guilty of felony murder, the defendant may not be convicted of the underlying felony offense.

See also Woratzeck v. Ricketts, 820 F.2d 1450 at 1457 (9th Cir. 1987), vacated on other grounds, 486 U.S. 1051 (1988). The Fifth Circuit has also upheld a similar rule in Mississippi death penalty cases. Jones v. Thigpen, 741 F.2d 805 at 815-816 (5th Cir. 1984). The United States Constitution clearly permits the States to impose criminal liability under a felony murder rule. Lockett v. Ohio, 438 U.S. 586 at 602 (1978); Tison v. Arizona, 481 U.S. 137 (1987); Bethea v. Scully, 834 F.2d 257 (2nd Cir. 1987) [upholding felony murder conviction for reckless conduct causing death]; Conner v. Director of Division of Adult Corrections, 870 F.2d 1384 at 1387-1388 (8th Cir. 1989) [under Iowa felony murder rule it was unnecessary to prove that the defendant actually participated in the homicide but only that he participated in the underlying felony]; Washington v. Watkins, 655 F.2d 1346 at 1366, n.39 (5th Cir. 1981) [accident is not a defense to homicide committed in the perpetration or attempt to perpetrate a felony]. See also Torcia, Wharton's Criminal

Law, 14th Ed., Vol. II, §145-150, pp. 201-230, 1989 Cum.Sup., pp. 78-90.

In Bell v. Watkins, 692 F.2d 999 at 1004-1005 (5th Cir. 1982), the Fifth Circuit explained why the Court's opinion in Beck v. Alabama, 447 U.S. 625 (1980), did not require that Bell receive a jury instruction on lesser included offenses in a trial under the felony murder rule. The Court stated:

> The due process clause of the fourteenth amendment requires a trial judge to give a lesser included offense instruction to the jury "if the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater." Beck v. Alabama, [supra] (quoting Keeble v. United States, 412 U.S. 205, 208, (1973)). . . . There is no due process violation, however, unless there is some evidence to support an instruction on the lesser included offense. Hopper v. Evans, 465 U.S. 605 (1982); Roberts v. Louisiana, 428 U.S. 325 (1976).
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> * * *
>
> The Alabama statute in question in Beck required a finding of intent to kill before a defendant could be convicted of capital murder. Since there was conflicting evidence on the issue of intent at trial, the State conceded that there was evidence to support a lesser included offense of "simple" felony murder. In contrast, any murder committed during the course of a robbery is capital under Mississippi

> law. Therefore, the trial court's refusal to give a lesser included offense instruction at Bell's request was proper, since there was no evidence to support the lesser charge. [Citations and footnotes omitted.]

Other States have held that the felony murder offense may not be split off to justify an instruction on the underlying felony as a lesser included offense. State v. Zeimet, 348 N.W.2d 338 at 342 (Minn. 1984); People v. Berzups, 402 N.E.2d 1155 at 1160 (N.Y. 1980); Ross v. State, 717 P.2d 117 at 121 (Okl.Cr. 1986), affirmed on other grounds, 487 U.S. 81 (1988); Woodkins v. State, 542 S.W.2d 855 at 858 (Tex.Cr. 1976), and Burns v. State, 556 S.W.2d 270 at 286 (Tex.Cr. 1977), cert. denied, 434 U.S. 935; State v. Cook, 332 S.E.2d 147 at 159-160 (W.Va. 1985).

A substantial number of States have held that in a felony murder case, a defendant is not entitled to instructions on lower degrees of homicide as lesser-included offenses. Brumbley v. State, 453 So.2d 381 at 386 (Fla. 1984); Conner v. State, 362 N.W.2d 449 at 454-457 (Iowa 1985); State v. Rueckert, 561 P.2d 850 at

855-858 (Kan. 1977); Commonwealth v. Evans, 454 N.E.2d 458 at 462-463 (Mass. 1983); State v. Reeves, 344 N.W.2d 433 at 442 (Nev. 1984); State v. Strickland, 298 S.E.2d 645 at 652-659 (N.C. 1983), and at 664-666 (Martin, J., and Mitchell, J., concurring); LeVasseur v. Commonwealth, 304 S.E.2d 644 at 657-659 (Va. 1983); State v. Frazier, 661 P.2d 126 at 132-133 (Wash. 1983); Richmond v. State, 554 P.2d 1217 at 1230-1233 (Wyo. 1976).

B. ROBBERY IS NOT A LESSER-INCLUDED OFFENSE OF FELONY MURDER UNDER THE STATUTORY ELEMENTS TEST SINCE FELONY MURDER MAY BE COMMITTED WITHOUT A ROBBERY.

Although as Petitioner has suggested, Harris v. Oklahoma, 433 U.S. 682 (1977), seems to hold that robbery is a lesser-included offense of felony murder, Harris was actually a case of successive prosecutions barred under the collateral estoppel rule (prosecution preclusion) defined by the Court in Grady v. Corbin, 495 U.S. ___, 110 S.Ct. 2084 (1990). As the Court explained in Corbin, Harris established a second test in successive

prosecutions to bar a second prosecution in addition to the Blockburger v. United States, 284 U.S. 299 (1932), statutory elements test. Grady v. Corbin, 110 S.Ct. at 2092-2093. See United States v. Benton, 852 F.2d 1456 at 1464-1465 (6th Cir. 1988), cert. denied, 488 U.S. 993, rejecting the argument that the elements test requires narrowing the elements of "the applicable statutes to be analyzed until they include only the alternatives [specific facts] relevant to the case at hand." Robbery may be committed without committing murder; felony murder may be committed without committing a robbery. Hence robbery is not a lesser-included offense of felony murder as defined by this Court in Schmuck v. United States, 489 U.S. 705 at 719 (1989):

> To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser.

C. THE STATES MAY IMPOSE THE BURDEN UPON THE DEFENDANT OF PRODUCING EVIDENCE TO SUPPORT A LESSER-INCLUDED OFFENSE INSTRUCTION; THE EVIDENCE DOES NOT ESTABLISH THAT PETITIONER'S TAKING OF THE VICTIM'S PROPERTY WAS A SEPARATE EVENT FROM THE HOMICIDE.

This Court has previously acknowledged the authority of the States to define the elements of criminal offenses. Martin v. Ohio, 480 U.S. 228 at 232 (1987). In Spaziano v. Florida, 468 U.S. 447 at 455-456 (1984), the Court noted:

> Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the [jury's factfinding] process. Beck does not require that result. . . . Requiring that the jury be instructed on a lesser included offense for which the defendant may not be convicted, however, would simply introduce another type of distortion into the factfinding process.

In Hopper v. Evans, 456 U.S. 605 at 611-612 (1982), the Court explained the ruling in Beck v. Alabama, supra, in part as follows:

> Due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. A jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence. . . . The federal rule is that a lesser included offense

> instruction should be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." Keeble v. United States, 412 U.S. 205, 208 (1973).

In Schmuck v. United States, supra, the Court revisited Keeble to determine the proper definition for a lesser included offense under F.R.Cr.P. 31(c), and concluded that the correct test was the statutory elements test. The Court stated in part, 489 U.S. 717:

> The Court recognized in Keeble v. United States, supra, that where the jury suspects that the defendant is plainly guilty of some offense, but one of the elements of the charged offense remains in doubt, in the absence of a lesser included offense instruction, the jury will likely fail to give full effect to the reasonable doubt standard, resolving its doubts in favor of conviction. [Emphasis added.]

Prior to the formulation of the test established in Keeble, the Court in Sansone v. United States, 380 U.S. 343 at 350 (1965), explained the test for a lesser-included offense instruction:

> In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is

> only proper where the charged greater offense requires the jury to find a <u>disputed</u> <u>factual</u> <u>element</u> which is not required for conviction of the lesser-included offense. [Emphasis added.]

Although in this case Petitioner argued before the jury that the robbery or theft of the stolen property found in his possession could have been a separate transaction from the homicide, he presented no evidence to support his argument that the homicide was unrelated to the theft of the stolen property which was ultimately found in his possession. The Due Process Clause permits the States to impose the burden upon the defendant of producing evidence to support a claim of fact made by the defendant during the jury trial so long as the prosecution bears the ultimate burden of proving the statutory elements beyond a reasonable doubt. <u>Patterson v. New York</u>, 432 U.S. 197 at 230-231 and at n.18 (1977) (Powell, Brennan and Marshall, J.J., dissenting):

> The State normally may shift to the defendant the burden of production, that is, the burden of going forward with sufficient evidence "to justify [a reasonable] doubt upon the issue." If

> the defendant's evidence does not cross this threshold, the issue . . . will not be submitted to the jury. [Citations and footnote omitted.]

As the Kentucky Supreme Court observed in Brown v. Commonwealth, 555 S.W.2d 252 at 257 (Ky., 1977):

> Whether one is referring to one of these affirmative "defenses" or to a lesser offense, the evidentiary situation and burden of proof are the same. Evidence suggesting that a defendant was guilty of a lesser offense is, in fact and in principle, a defense against the higher charge, though it is not a "defense" within the technical meaning of that term as used in the Kentucky Penal Code, cf. KRS 500.070. . . . Whatever may be its other infirmities, Mullaney v. Wilbur, 421 U.S. 684 (1975), does not stand for the proposition that the prosecution is required to produce evidence in negating every fact and circumstance that could serve either to reduce the degree of or to raise an absolute defense to the crime charged. Once there is evidence sufficient to create a doubt, yes -- then the state has a burden of proof and there must be an instruction so casting it. . . .

The facts found by the Arizona Supreme Court in this case do not support the Petitioner's suggestion that his theft of the deceased's victim's property was a separate event from the killing of the victim. The victim's death

permitted the victim's property (in particular the motor vehicle found in Petitioner's possession) to be stolen from the deceased victim's possession. See State v. Schad, supra, 788 P.2d at 1164; State v. Schad, 633 P.2d 366 at 370-373 and 381 (Ariz. 1981).

The States may impose a burden on the defendant in a criminal case of producing evidence to justify a lesser-included offense instruction. This burden is constitutionally permissible. Petitioner failed to produce evidence to support his contention that the homicide was a separate transaction or should be disassociated from the theft of the stolen property found in his possession. See Fleener v. State, 412 N.E.2d 778 at 782 (Ind. 1980).

## CONCLUSION

WHEREFORE, the opinion below should be affirmed.

Respectfully submitted,

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# APPENDIX

**Arizona Revised Statute §13-1105.**
**First degree murder; classification**

A. A person commits first-degree murder if:

1. Intending or knowing that his conduct will cause death, such person causes the death of another with premeditation; or

2. Acting either alone or with one or more other persons such person commits or attempts to commit sexual conduct with a minor under §13-1405, sexual assault under §13-1406, molestation of a child under §13-1410, narcotics offenses under §13-3408, subsection A, paragraph 7 or §13-3409, kidnapping under §13-1304, burglary under 13-1506, 13-1507 or 13-1508, arson of an occupied structure under §13-1704, robbery under §13-1902, 13-1903 or 13-1904, escape under §13-2503 or 13-2504 or child abuse under §13-3623, subsection B, paragraph 1, and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.

B. Homicide, as defined in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.

C. First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by §13-703.